Supreme Court, U.S.
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No._____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

STATE OF ARKANSAS, Petitioner,

V.

WALTER DON MAZEPINK, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Can a person who is not present when police officers execute a valid search warrant challenge the officers' failure to knock and announce before entering to execute the warrant?

PARTIES TO THE PROCEEDINGS

Petitioner State of Arkansas was the appellee in the Arkansas Supreme Court. Respondent Walter Don Mazepink was one of two appellants before the Arkansas Supreme Court. The other appellant below, Janice Gail Schnitzlein, has no stake in the outcome of the petition.

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The State of Arkansas respectfully petitions for a writ of certiorari to review the judgment of the Arkansas Supreme Court in this case.

OPINION BELOW

The opinion of the Arkansas Supreme Court is reported at 336 Ark. 171. Appendix at A-1 to A-20.

JURISDICTION

The Arkansas Supreme Court entered its judgment in this case on January 28, 1999. Appendix at A-1. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

In December 1996, Detective Wayne Barnett of the Fort Smith, Arkansas, Police Department coordinated an investigation of respondent Mazepink and his girlfriend Janice Schnitzlein, who were suspected of trafficking methamphetamine. (R. 168-69, 219) On December 20, Detective Barnett received information from a confidential informant that Mazepink and Schnitzlein were living

at 4216 Spradling Avenue and had been providing the informant methamphetamine.[1] (R. 169) Under Detective Barnett's supervision, the informant went to Mazepink's and Schnitzlein's house and bought about an ounce of methamphetamine. (R. 171-72, 175) After the drug buy, the informant told Detective Barnett that Mazepink and Schnitzlein had several more baggies of methamphetamine, as well as drug paraphernalia, such as syringes, in their house. (R.174)

Based largely upon information obtained from the informant, Detective Barnett obtained a warrant to search Mazepink's and Schnitzlein's house and its outbuildings, areas where police knew that Schnitzlein had previously hidden drugs. (R. 175-76) Other officers accompanied Detective Barnett to execute the warrant. (R. 184, 207) As the officers approached the house, Mazepink was driving away. (R. 183) When the officers reached the house, the window shades were closed, the front, wooden door was shut, and everything was quiet. (R. 205) For purposes of this petition, the State acknowledges that the officers did not have a reasonable suspicion that knocking and announcing would be dangerous, futile, or inhibit their effective investigation of the crime.

Around 6:55 p.m., Detective Barnett approached the door, knocked on it, and all the officers yelled, "[P]olice[.] [S]earch warrant[.]" (R. 184, 266) About two to three seconds later, Officer Monty McMillen forced open the door with a battering ram. (R. 184, 232, 266-67) Officer McMillen and Detective Barnett were the first two through the door. (R. 184-85) Once inside, police found Tricia Bencie, Schnitzlein's adult daughter, in the living room. (R. 185, 247) Detective Barnett found Schnitzlein in the

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[1] Detective Barnett also checked county records which verified that 4216 Spradling Avenue was Mazepink's and Schnitzlein's residence. (R. 179)

back bedroom, attempting to hide a sandwich bag of methamphetamine and a syringe underneath a pillow on the bed. (R. 185-86, 217) While officers were executing the warrant, Mazepink returned and was arrested. (R. 189) During their search, officers found drug paraphernalia, large amounts of methamphetamine and cash, and a small amount of marijuana.[2] (R. 185-86, 190)

As a result of the search, Mazepink and Schnitzlein were charged with possession of methamphetamine with intent to deliver and possession of drug paraphernalia. (R. 4, 60) Before trial, they both filed motions to suppress the evidence seized from their house claiming, among other things, that their Fourth Amendment rights had been violated. (R. 10-11, 66) Both Mazepink and Schnitzlein argued at the suppression hearing that the evidence should be suppressed because the officers failed to knock and announce their presence and authority before entering the house as required by *Wilson v. Arkansas*, 514 U.S. 927 (1995), and *Richards v. Wisconsin*, 520 U.S. 385 (1997), and that no countervailing law-enforcement interests excused their failure to do so. (R. 277-81)

The trial court denied the motions, ruling that the officers acted reasonably under the circumstances. (R. 299) Mazepink and Schnitzlein subsequently entered pleas of *nolo contendere* to the charges, conditioned on their rights to pursue appeals of the denials of their motions to suppress. (R. 48-49, 149-50) The trial court then sentenced Mazepink to forty years' imprisonment,

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[2] Both Mazepink and Schnitzlein made statements to police officers at the scene. (R. 188, 190, 198, 225, 235-41) Although they both moved to suppress their statements, they did not argue to the trial court or on appeal that the statements should have been suppressed because the officers failed to knock and announce. (R. 12-13, 77-78, 115-28, 276-81, 299-301) Consequently, only the admissibility of the physical evidence seized during the search, not the statements, is at issue.

with twenty suspended, and Schnitzlein to forty years' imprisonment, with ten years suspended, plus court costs, a $4,850 fine, and a $21,295 forfeiture. (R. 319-20)

On appeal to the Arkansas Supreme Court, Mazepink and Schnitzlein repeated their argument that the evidence seized from their house should have been suppressed because the officers who executed the warrant failed to knock and announce properly. The State addressed the arguments on the merits, and further argued that Mazepink's Fourth Amendment rights could not have been violated by the allegedly illegal entry because he was not present at the time of the entry. The State also argued that the exclusionary rule should not apply to violations of the knock-and-announce rule.[3]

In an opinion issued on January 28, 1999, the Arkansas Supreme Court reversed the trial court's denial of the motions to suppress and remanded the case to vacate Mazepink's and Schnitzlein's pleas of *nolo contendere*. Appendix at A-20. The court first rejected the State's argument that Mazepink could not challenge the method of entry, holding that because he had a legitimate expectation of privacy in the house, he could challenge it. Appendix at A-4 to A-8. Although the Court noted that the case might have been decided differently had no one been in the house when the officers entered, it relied on footnote 11 of *Alderman v. United States*, 394 U.S. 165 (1969), to conclude that

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[3] Although the State's legal arguments were first raised in the appellate court, the Arkansas Supreme Court has repeatedly held that it will affirm a lower court for reaching the right result, even if for a different reason. *E.g., Register v. State,* 313 Ark. 426, 428, 855 S.W.2d 320, 321 (1993). Consistently with this rule, that court will consider arguments to affirm raised by the appellee for the first time on appeal. *See, e.g., Summers v. State*, 292 Ark. 237, 239-40, 729 S.W.2d 147, 148 (1987)(affirming judgment on basis of argument not made by appellee in lower court, but raised for first time on appeal).

Mazepink's expectation of privacy encompassed not only privacy for himself, but for his family and invitees, who were present when the officers entered. Appendix at A-7. The court went on to hold that, although the officers knocked and announced, their two-to-three second delay before entering constituted a "no-knock" entry and that no exigent circumstances justified their conduct.[4] Appendix at A-9 to A-15. Finally, the court rejected the State's argument that the exclusionary rule does not require the suppression of evidence for violations of the knock-and-announce rule. Appendix at A-16 to A-20.

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[4] Although the State does not concede that the officers' entry was unreasonable, it does not contest that holding for purposes of this petition.

REASONS FOR GRANTING THE WRIT

The Arkansas Supreme Court's decision reflects confusion about a difficult and very important issue in the criminal law: who may challenge the *method* of conducting an otherwise valid search. In this case, the court concluded that police officers' failure to knock and announce violated an absent defendant's Fourth Amendment rights, even though the defendant was at least initially unaware of the search, let alone its method of execution. The court reached this conclusion by misapplying the law articulated by this Court concerning who may challenge a search. The opinion below held that because the defendant had an expectation of privacy in the *area* searched – a proposition the State has never disputed – that the defendant's Fourth Amendment rights were violated by the *method* of execution of the search. This conclusion misapprehends this Court's principles concerning who may challenge a search, and does so in a manner that can cause great harm if allowed to go uncorrected. *See, e.g., Rakas v. Illinois*, 439 U.S. 128, 137 (1978)(explaining the "substantial social cost" that the exclusionary rule imposes by keeping "[r]elevant and reliable evidence" from the trier of fact).

I. The Arkansas Supreme Court's Decision Conflicts With The Decisions Of Other State And Federal Courts.

The Arkansas Supreme Court's decision that a legitimate expectation of privacy in the premises searched entitles an absent defendant to challenge the officers' method of entry has created a conflict of authority on this point. Two federal courts of appeals have reached conclusions contrary to that of the Arkansas Supreme Court when interpreting 18 U.S.C. § 3109, the federal knock-and-announce statute for which this Court has held its Fourth Amendment decisions in *Wilson* and *Richards* serve as guideposts. *United States v. Ramirez*, 118 S. Ct. 992, 997 (1998). In *United*

States v. Valencia-Roldan, 893 F.2d 1080, 1081 n.1 (9th Cir.), *cert. denied*, 495 U.S. 935 (1990), the United States Court of Appeals for the Ninth Circuit held that a defendant who lived in an apartment, but was not present when officers executed a warrant, could not allege a violation of the knock-and-announce statute, even though another person was present when the officers entered. *See also United States v. Zermeno*, 66 F.3d 1058, 1062 (9th Cir. 1995) (holding, among other reasons, that defendant could not challenge officers' failure to knock and announce because not present at time of officers' entry).

Similarly, in *United States v. DeLutis*, 722 F.2d 902, 908 (1st Cir. 1983), the court noted that there was "serious doubt" that an absentee owner could raise officers' failure to knock and announce, even though another person was present at the time of the entry. In doing so, the court pointed out that the purposes of the knock-and-announce rule are "to protect the individual's right of privacy in his house, and . . . to safeguard officers, who might be mistaken for unlawful intruders into a home." *Id.* (citing *Sabbath v. United States*, 391 U.S. 585 (1968)). In the court's view, an absentee owner "hardly comes within the purposes of the statute[ ]" and thus cannot claim its protection. *Id.*

State courts also have reached decisions contrary to the court in this case. In *State v. Papineau*, 146 Ariz. 272, 273, 705 P.2d 949, 950 (Ariz. Ct. App. 1985), for example, the Arizona Court of Appeals held that a defendant who was a resident of a house could not challenge officers' failure to knock and announce before entering to execute a search warrant because he was not present when the officers entered. Although the court was interpreting an Arizona statute requiring officers to knock and announce, it relied upon this Court's opinion in *Rakas*[5] to conclude

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[5] *In Rakas*, 439 U.S. at 140, the Court held that the answer to the question of whether a defendant can raise a Fourth Amendment claim "requires

that the defendant could not challenge the officers' method of entry. *Papineau*, 146 Ariz. at 273, 705 P.2d at 950. After considering the interests protected by knocking and announcing, the court held that a defendant not present at the time of entry had no such interests invaded by entry through an unlocked door. *Id.* Consequently, that defendant could not complain about the alleged illegality of the entry. *Id.*, 146 Ariz. at 273-74, 705 P.2d at 950-51. Other state courts have reached similar conclusions. *See State v. Johnson*, 716 P.2d 1006, 1010 (Alaska Ct. App. 1986)(co-tenants of house who were not present at the time of officers' entry, even though one co-tenant present, could not complain about the officers' violation of that state's knock-and-announce rule); *see also Righter v. State*, 704 A.2d 262, 265-67 (Del. 1997)(concluding trial counsel not ineffective for failing to allege violation of Fourth Amendment's knock-and-announce rule because defendant not present when officers entered and, although he lived in house, did not have property interest in it), *cert. denied*, 118 S. Ct. 1814 (1998).

The Arkansas Supreme Court's decision not only exposes the conflict of authority concerning in what circumstances a person with an expectation of privacy can raise a violation of the knock-and-announce rule, but also whether a person without such an expectation can ever claim such a violation. In other words, can a person without a legitimate expectation of privacy in the premises, but who is present when officers enter, challenge officers' failure to knock and announce? *In United States v. Grandstaff*, 813 F.2d 1353, 1357 (9th Cir.)(per curiam), *cert. denied*, 484 U.S. 837 (1987), the court answered this question "no," concluding that a defendant present in a hotel room could not raise a Fourth Amendment challenge to officers' failure to

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a determination of whether the disputed search and seizure has infringed an interest of the defendant which the Fourth Amendment was designed to protect."

knock and announce because he did not have a legitimate expectation of privacy in the room. *See also United States v. Lockett*, 919 F.2d 585, 588-90 (9th Cir. 1990)(holding that person who was present but lacked legitimate expectation of privacy could not challenge officers' failure to knock and announce). In contrast, in *United States v. Garcia*, 741 F.2d 363, 366 & n.2 (11th Cir. 1984)(per curiam), the court held that a person present at the time of the officers' entry, but without a legitimate expectation of privacy in the area searched, could challenge the officers' failure to comply with 18 U.S.C. § 3109.

As these conflicting decisions illustrate, this Court has not yet decided what persons are entitled to claim that their Fourth Amendment rights have been violated when police officers fail to knock and announce when entering premises to execute a warrant. The Court should grant the petition to resolve the conflict of authority.

II. The Arkansas Supreme Court Erroneously Decided An Important Fourth Amendment Question By Holding That A Person Not Present At The Time Of Police Officers' Entry Nevertheless Can Challenge The Officers' Failure To Knock And Announce.

Having only recently decided *Wilson*, the Court has not yet determined who can rightfully claim that their Fourth Amendment rights were violated by officers' failure to knock and announce. The Arkansas Supreme Court erred, however, when it extended the protection of the Fourth Amendment's knock-and-announce rule to a criminal defendant who was not even present at the time he claimed that the officers should have knocked and announced for his benefit. Instead of analyzing whether the method of entry infringed any interest of Mazepink's that the Fourth Amendment was designed to protect, as required

by this Court's decisions, the court asked only whether he had a legitimate expectation of privacy in the area searched, a proposition the State has never disputed. Had it properly considered whether the officers infringed any interests of Mazepink's, it would have concluded that he could not challenge the officers' failure to knock and announce.

The source of the lower court's confusion is easy to trace. To determine whether Mazepink could challenge the officers' method of entry, the court below asked the typical question of whether he had "a legitimate expectation of privacy in the invaded place." *Minnesota v. Carter*, 119 S. Ct. 469, 473 (1998)(quoting *Rakas*, 439 U.S. at 143); *see also Minnesota v. Olson*, 495 U.S. 91, 95 (1990). There is no doubt that Mazepink could challenge the search itself – police officers entered his house and seized evidence there. The lower court erred, however, by concluding that because Mazepink could challenge the search generally, his rights necessarily were infringed by any defect in the method of entering to execute the search warrant. This conclusion short circuits what this Court has identified as the proper Fourth Amendment inquiry:

> whether the challenged search or seizure violated the Fourth Amendment rights of a criminal defendant who seeks to exclude the evidence obtained during it. That inquiry in turn requires a determination of whether the disputed search and seizure has infringed an interest of the defendant which the Fourth Amendment was designed to protect.

Rakas, 439 U.S. at 140.

Mazepink has never claimed that the actual search of his house and the seizure of evidence infringed any Fourth Amendment interest of his, nor could he reasonably do so. Police

officers were acting pursuant to a valid search warrant, and nothing in the record indicates that the search exceeded the scope of that warrant. It is also clear that the failure to knock and announce did not "infringe[ ] an interest *of the defendant* which the Fourth Amendment was designed to protect." *Id.* (emphasis added). As this Court has noted, the purposes of the knock-and-announce rule are to inform occupants of a dwelling that it is about to be invaded, give them an opportunity to comply with the law, and avoid damage to property by allowing the occupants to open the door so that the police can enter peaceably. *Richards*, 520 U.S. at 393 n.5. By definition, the failure to knock and announce cannot infringe these interests of a person who is not present at the time of the entry.

The Arkansas Supreme Court tacitly acknowledged the illogic of its view when it stated that the case might have been decided differently had no one been present at the time of the officers' entry. Appendix at A-7. It could hardly be otherwise, for, as this Court noted in *Wilson*, the need for notice "is obviated [when] there was nobody on whom a demand could be made[.]" *Id.*, 514 U.S. at 935 (quoting *Pugh v. Griffith*, 7 Ad. & E. 827, 840-41, 112 Eng.Rep. 681, 686 (K.B. 1838)); *see also* 2 W. LaFave, *Search and Seizure* § 4.8(b), at 605 & n.44 (3rd. ed. 1996)(collecting cases). The presence or absence of other people in the house simply has no bearing on whether the *defendant's* Fourth Amendment rights were violated. When the persons seeking suppression are not present, their sense of security is no more or less violated by an unannounced entry merely because other persons are present in the house.[6]

The decision in this case brings to the forefront an important, unresolved question about who may challenge the

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[6]Because Mazepink's co-defendant, Schnitzlein, was present when the officers entered, her Fourth Amendment interests were infringed, and the Arkansas Supreme Court ordered that the seized evidence against her be suppressed.

method of conducting a search. Other types of cases also present this issue. It is unclear, for example, whether a person with no expectation of privacy in the place searched can successfully challenge officers' failure to knock and announce. *Compare Grandstaff*, 813 F.2d at 1357, *with Garcia*, 741 F.2d at 366 & n.2. It is also unclear whether the improper manner in which an otherwise valid warrant is executed – the law requires daytime execution, for example, but the officers execute it at night – is grounds for raising a suppression claim when the defendant is not present at the time. *Compare Hanna v. State*, 591 A.2d 158, 164 (Del. 1991)(defendant not present can challenge execution of warrant at night), *with United States v. Ravich*, 421 F.2d 1196, 1201 (2nd Cir.)(Friendly, J.)(suppression of evidence not required for execution of warrant at night because hotel room unoccupied when searched), *cert. denied*, 400 U.S. 834 (1970). The Court should grant the petition to decide who can challenge the method of executing a valid search warrant.

CONCLUSION

For the reasons and authorities set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

SUPREME COURT OF ARKANSAS
No. CR 98-330

Opinion Delivered Jan 28 1999

WALTER DON MAZEPINK AND JANICE GAIL SCHNITZLEIN, APPELLANTS;	APPEAL FROM THE SEBASTIAN COUNTY CIRCUIT COURT FORT SMITH DISTRICT, NO. CR 96-1108;
VS.	HON. DON LANGSTON, JUDGE;
STATE OF ARKANSAS, APPELLEE;	REVERSED AND REMANDED.

DONALD L. CORBIN, Associate Justice

Appellants Walter Don Mazepink and Janice Gail Schnitzlein appeal the judgment of the Sebastian County Circuit Court denying their motion to suppress evidence obtained after a search of their home. Appellants argue on appeal that the trial court erred in denying their suppression motion because the officers executing the search warrant failed to knock and announce their presence in compliance with the Fourth Amendment to the United States Constitution. Our jurisdiction of this appeal is pursuant to Ark. Sup. Ct. R. 1-2(a)(1). We find merit to Appellants' argument, and we reverse.

The record reflects that on December 20, 1996, Fort Smith Police officers obtained a search warrant for Appellants' residence. The search warrant did not contain a no-knock provision. At the time they executed the warrant, officers were aware that the house was occupied only by Appellant Schnitzlein and her adult daughter; Appellant Mazepink had been seen by surveillance officers leaving the residence shortly before the search. When

the officers approached the residence, they knocked on the front door and shouted, "Police, search warrant[.]" Two or three seconds later, the officers broke open the door with a battering ram and entered the house. Once inside, officers seized approximately twelve ounces of methamphetamine and various items of drug paraphernalia.

Appellants were subsequently arrested and charged with possession of methamphetamine with intent to deliver and possession of drug paraphernalia. Appellants filed a motion to suppress the evidence seized during the search of their house on the basis that the officers' failure to comply with the "knock and announce" requirement violated their Fourth Amendment rights. The trial court found that the officers' actions were reasonable under the circumstances and thus denied the suppression motion. Both Appellants then entered conditional pleas of *nolo contendere* to the charges, pursuant to A.R.Cr.P. Rule 24.3. Appellant Mazepink was sentenced to a total of forty years' imprisonment, with imposition of twenty years suspended. Appellant Schnitzlein was sentenced to a total of forty years' imprisonment, with imposition of ten years suspended. This appeal followed.

On appeal, Appellants do not contest that the police officers knocked on their door and announced their presence immediately prior to entering the house and conducting the search. They argue that the officers' announcement nonetheless violated Fourth Amendment standards because the interval of time between the announcement and subsequent entry was not sufficient to allow the occupants an opportunity to comply with the law and permit the officers to enter prior to the officers breaking in the door and forcing their way into the home. They contend that under the guidelines recently established by the Supreme Court in *Wilson v. Arkansas*, 514 U.S. 927 (1995), and *Richards v. Wisconsin*, 520 U.S. 385 (1997), the entry into their home was unreasonable under the Fourth Amendment.

The State initially argues that the officers complied with the guidelines set out by the Court. Alternatively, the State asserts that there were exigent circumstances that would have allowed the officers to forego the "knock and announce" requirement altogether. The State argues further that even if the officers' entry into the house was illegal, suppression of the evidence was not warranted because the officers had valid search warrant, and the items of evidence seized would therefore have been discovered despite the illegal entry.

When we review a trial court's denial of a motion to suppress evidence, we make an independent determination based on the totality of the circumstances, viewing the evidence in a light most favorable to the State, and reverse only if the trial court's ruling was clearly against the preponderance of the evidence. *Moya v. State*, 335 Ark. 193, ___ S.W.2d ___ (1998); *Fultz v. State*, 333 Ark. 586, 972 S.W.2d 222 (1998). To resolve the issue presented here, we must first decide whether the officers executing the warrant complied with the "knock and announce" rules established by the Supreme Court. If we determine that the officers did not comply with those rules, we must then decide whether there were exigent circumstances that would permit them to enter Appellants' home unannounced. Lastly, if we conclude that there were not any such exigent circumstances, we must then decide the appropriate remedy for the officers' illegal conduct, specifically whether exclusion or suppression of the evidence is warranted. Before we begin an analysis of the merits, however, we must first address the issue of standing raised by the State.

I. Mazepink's Fourth Amendment Rights

The State argues that Appellant Mazepink lacks standing to challenge the officers' method of entry into his residence because he was not present at the time the officers entered the house. The State contends that the purposes of the "knock and

announce" rule are to (1) inform the occupants of the premises that it is about to be legally invaded, (2) give them an opportunity to comply with the law, and (3) avoid damage to property. *See Richards*, 520 U.S. 385. Given those purposes, the State asserts that persons not present at the time of entry cannot claim that their rights have been infringed upon by officers who do not comply with the "knock and announce" rule. The State urges us to reject traditional Fourth Amendment analysis pertaining to the defendant's legitimate expectation of privacy in the place searched and the items seized. Under the particular facts of this case, we are not persuaded by the State's argument.

In *Wilson*, 514 U.S. 927, the Court established that the "common-law 'knock and announce' principle forms a part of the reasonableness inquiry under the Fourth Amendment." *Id.* at 929. The doctrine of standing to invoke the Fourth Amendment exclusionary rule focuses on the defendant's substantive Fourth Amendment rights. *State v. Hamzy*, 288 Ark. 561, 709 S.W.2d 397 (1986) (citing *Rakas v. Illinois*, 439 U.S. 128 (1978)). Thus, we must determine:

> whether the challenged search and seizure violated the Fourth Amendment rights of a criminal defendant who seeks to exclude the evidence obtained during it. That inquiry in turn requires a determination of whether the disputed search and seizure has infringed an interest of the defendant which the Fourth Amendment was designed to protect.

Rakas, 439 U.S. at 140. Using this analysis, the court should not exclude evidence under the Fourth Amendment unless it finds that an unlawful search or seizure violated the defendant's own constitutional rights; his rights are violated only if the challenged conduct invaded his legitimate expectation of privacy, rather than that of a third party. *Hamzy*, 288 Ark. 561, 709 S.W.2d 397 (citing

United States v. Payner, 447 U.S. 727 (1980); *Rakas*, 439 U.S. 128). Thus, the pertinent inquiry here is whether Mazepink manifested a subjective expectation of privacy in the area searched and whether society is prepared to recognize that expectation as reasonable. *See McCoy v. State*, 325 Ark. 155, 925 S.W.2d 391 (1996).

In *Rakas*, the Court indicated that a legitimate expectation of privacy means more than a defendant's subjective expectation of not being discovered. The Court explained:

> Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society. *One of the main rights attaching to property is the right to exclude others, . . . and one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude. . . .* No better demonstration of this proposition exists than the decision in *Alderman v. United States*, 394 U.S. 165 (1969), where the Court held that an individual's property interest in his own home was so great as to allow him to object to electronic surveillance of conversations emanating from his home, *even though he himself was not a party to the conversations.*

439 U.S. at 144 n.12 (citations omitted) (emphasis added). This court has likewise recognized that where the defendant owns or possesses the property searched, he or she has standing to challenge the search under the Fourth Amendment. *See, e.g., Hodge v. State*, 332 Ark. 377, 965 S.W.2d 766 (1998); *Stanley v. State*, 330 Ark. 642, 956 S.W.2d 170 (1997). Here, the State does not dispute that Mazepink resided in the house that was the

subject of the search. Thus, under traditional Fourth Amendment analysis, Mazepink has standing to challenge the legality of the search, which, pursuant to the Court's holding in *Wilson*, 514 U.S. 927, includes the method of entry and execution of the search.

The State relies on the holdings in *State v. Johnson*, 716 P.2d 1006 (Alaska Ct. App. 1986), and *State v. Papineau*, 705 P.2d 949 (Ariz. Ct. App. 1985). In both cases, the appellants sought to exclude evidence obtained with search warrants on the ground that the officers did not knock and announce their presence prior to entering the premises. Both courts held that the appellants, who were not present at the time the police entered the premises, lacked standing to challenge the method of entry under the Fourth Amendment. Neither case, however, involved forced entry that resulted in damage to the appellants' property; rather, officers entered through unlocked doors. In *Papineau*, 705 P.2d 949, the Arizona court explained the general purposes behind the "knock and announce" rule, underscoring the lack of destruction to the property in that case:

> The right which knock and announce rules provide *occupants* is the right to be warned that their privacy is about to be legally invaded." *State v. Sanchez*, 128 Ariz. 525, 528, 627 P.2d 676, 679 (1981) (emphasis added). Also important are avoidance of violent confrontations attendant to unannounced entries, *prevention of destruction of property*, and preventing unexpected exposure of private activities. *State v. Sanchez*, supra; *State v. Wright*, 131 Ariz. 578, 643 P.2d 23 (App. 1982). *Entry through an unlocked door involves no destruction of property*. While those present may have felt their privacy unjustifiably invaded and while the entry may have heightened the risk of violent confrontation, only those present would have rights that would be violated.

Id. at 950 (emphasis added). Similarly, in *Wilson*, 514 U.S. 927, the Court explained that the common-law "knock and announce" rule "was justified in part by the belief that announcement generally would avoid 'the destruction or breaking of any house . . . by which great damage and inconvenience might ensue[.]'" *Id.* at 935-36 (quoting *Semayne's Case*, 5 Co. Rep. 91a, 91b, 77 Eng. Rep. 194, 196 (K. B. 1603)).

We decline to apply the ultimate holdings in *Johnson* and *Papineau* to the particular facts of the case at hand, because neither case involved the forced entry or destruction of the appellants' property resulting from the entry, and because both cases were decided prior to the Court's decision in *Wilson*, wherein noncompliance with the "knock and announce" rule was deemed part of the reasonableness inquiry under the Fourth Amendment.

Our analysis of this issue might have been different if there had been no occupants inside the residence at the time the police forced their entry into the home. Arguably, had no one been present at the time of entry, the officers may have had no alternative but to force entry by breaking in the door with a battering ram. Here, however, there were two persons inside the residence, and the officers were aware of this. Thus, at least one person was present to comply with the officers' request for entry so that they could execute their search warrant. It seems irrelevant under these circumstances that Mazepink was not actually present at the time of entry; his standing to seek exclusion of the evidence obtained after the search is grounded in his right to exclude others and to be free from illegal police invasion of his privacy in his residence. Furthermore, Mazepink's legitimate expectation of privacy in his residence encompasses the right to expect not only privacy for himself, but for his family and invitees, including his live-in girlfriend, Appellant Schnitzlein, and her daughter. *See Alderman v. United States*, 394 U.S. 165, 179 n.11 (1968) (holding that in cases where electronic surveillance is carried out either by

means of a physical entry or by surveillance without a technical trespass, "officialdom invades an area in which the homeowner has the right to expect privacy for himself, his family, and his invitees, and the right to object to the use against him of the fruits of that invasion, not because the rights of others have been violated, but because his own were"). We turn now to the merits of Appellants' argument concerning the validity of the officers' method of entry into their residence.

II. Knock and Announce

As discussed previously, the Supreme Court in *Wilson*, 514 U.S. 927, recognized that under the common law of search and seizure, the reasonableness of the search of a dwelling pursuant to the Fourth Amendment may depend in part on whether law enforcement officers announced their presence and authority prior to entering. The Court held:

> Given the longstanding common-law endorsement of the practice of announcement, we have little doubt that the Framers of the Fourth Amendment thought that the method of an officer's entry into a dwelling was among the factors to be considered in assessing the reasonableness of a search or seizure. Contrary to the decision below, we hold that in some circumstances an officer's unannounced entry into a home might be unreasonable under the Fourth Amendment.
>
> This is not to say, of course, that every entry must be preceded by an announcement. The Fourth Amendment's flexible requirement of reasonableness should not be read to mandate a rigid rule of announcement that ignores countervailing law enforcement interests.

Id. at 934. The Court left it to the lower courts to determine the circumstances under which an unannounced entry would be reasonable under the Fourth Amendment.

In *Richards*, 520 U.S. 385, the Court expanded upon its holding in *Wilson*. There, the Court rejected the Wisconsin Supreme Court's blanket rule that police officers are never required to knock and announce their presence when executing a search warrant in a felony drug investigation. The Court reasoned that "[i]f a *per se* exception were allowed for each category of criminal investigation that included a considerable – albeit hypothetical – risk of danger to officers or destruction of evidence, the knock-and-announce element of the Fourth Amendment's reasonableness requirement would be meaningless." *Id.* at 394. The Court observed that although felony drug investigations may frequently present circumstances warranting unannounced entries, that fact "cannot remove from the neutral scrutiny of a reviewing court the reasonableness of the police decision not to knock and announce *in a particular case.*" *Id.* (emphasis added). The Court then set forth the test for determining whether an unannounced entry was reasonable:

> In order to justify a "no-knock" entry, the police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence. This standard – as opposed to a probable cause requirement – strikes the appropriate balance between the legitimate law enforcement concerns at issue in the execution of search warrants and the individual privacy interests affected by no-knock entries.... This showing is not high, but the police should be required

> to make it whenever the reasonableness of a no-knock entry is challenged.

Id. at 394-95 (citations omitted). The court concluded that the foregoing test should be applied by trial courts on a case-by-case basis, to determine whether the facts and circumstances of the particular entry justified dispensing with the "knock and announce" requirement.

In the present case, Appellants do not dispute that the officers knocked on the door and announced their presence and purpose prior to forcibly entering the residence. This fact does not, however, resolve the issue in this case because the Fourth Amendment not only requires officers to go through the motions of knocking and announcing, it also requires them to wait a reasonable period of time before forcing entry into the premises. A refusal to reply to the officers' order to open the door may be inferred from silence. *United States v. Mendonsa*, 989 F.2d 366 (9th Cir. 1993). Correspondingly, if the occupants do not admit the officers within a reasonable period of time, the officers may be deemed to be constructively refused admittance and may then enter by force. *United States v. Moore*, 91 F.3d 96 (10th Cir. 1996). Thus, before officers may force entry into the premises, they must wait long enough to have been constructively refused entry by the occupants. There is no exact measurement of time required before the officers are said to have been constructively refused entry; rather, the reasonableness of the time interval has been determined on a case-by-case basis.

In *Moore*, 91 F.3d 96, for example, where the forced entry was virtually instantaneous with the announcement, the Tenth Circuit concluded that the time interval, which was no more than three seconds, precluded any claim that the officers had been constructively refused entrance to the premises. Similarly, in

United States v. Marts, 986 F.2d 1216 (8th Cir. 1993)[1], the Eighth Circuit concluded that a time interval of less than five seconds, absent exigent circumstances, was insufficient to comply with "knock and announce" standards. There, the court observed that the officers' reasonable belief that firearms may have been present inside the residence, standing alone, was insufficient to establish exigent circumstances. The court explained:

> This court is surely cognizant of the balancing act which law enforcement officers must undertake in the performance of their duties. In fighting the "war on drugs," officers have every reason to be fearful of hostility and even gunfire. However, a ruling which excuses action which would otherwise constitute clear misconduct, based upon the subjective fears and beliefs of officers, would emasculate the rule, reducing it to nothing more than a "knock and enter" rule.

Id. at 1218 (citation omitted). *See also United States v. Lucht*, 18 F.3d 541 (8th Cir.), *cert. denied*, 513 U.S. 949 (1994) (holding that a wait of three to five seconds before forcing entry was insufficient absent evidence that the officers were in danger or that evidence was being destroyed); *Mendonsa*, 989 F.2d 366 (holding that, absent exigent circumstances, a forced entry after only three to five seconds of silence following the officers'

---

[1] Many of the federal cases, including *Marts*, have analyzed the officers' actions within the context of 18 U.S.C. § 3109, as opposed to that of the Fourth Amendment. The Supreme Court resolved any apparent conflict between the "knock and announce" requirement in § 3109 and that of the Fourth Amendment in *United States v. Ramirez*, 523 U.S. ___, 118 S. Ct. 992 (1998), holding that § 3109 was merely a codification of the common law, and that the decisions in *Wilson*, 514 U.S. 927, and *Richards*, 520 U.S. 385, serve as guideposts in construing analysis under either provision.

announcement was not reasonable and required suppression of the evidence); *United States v. Nabors*, 901 F.2d 1351 (6th Cir.), *cert. denied*, 498 U.S. 871 (1990) (holding that instances in which officers make a forced entry seconds after announcing their presence and authority will be carefully scrutinized to determine whether there is compliance with 18 U.S.C. § 3109); *People v. Polidori*, 476 N.W.2d 482 (Mich. Ct. App. 1991), *cert. denied*, 506 U.S. 905 (1992) (holding that the time interval of six seconds between announcement and entry was insufficient to comply with Michigan's "knock and announce" statute or the Fourth Amendment); *State v. Bates*, 587 P.2d 747 (Ariz. 1978) (holding that, absent exigent circumstances, an interval of three to five seconds was insufficient to demonstrate that the officers had been constructively refused).

On the other hand, in *United States v. Markling*, 7 F.3d 1309 (7th Cir. 1993), *cert. denied*, 115 S. Ct. 1327 (1995), the Seventh Circuit held that a time interval of seven seconds between announcement and entry was sufficient under the circumstances. Specifically, the court found significant the facts that (1) there was no noise coming from the apartment, which may have made it difficult for the occupant to hear the officers, (2) the room was small, and (3) two women, who had just come from the apartment after purchasing cocaine from the defendant, told the officers that the defendant would likely flush the remaining drugs down the toilet. *See also United States v. Jones*, 133 F.3d 358 (5th Cir.), *cert. denied*, 118 S. Ct. 1854 (1998) (holding that under the particular circumstances of that case, including the readily destroyable nature of drugs, fifteen to twenty seconds was sufficient time for the officers to wait before entering the premises); *United States v. Knapp*, 1 F.3d 1026 (10th Cir. 1993) (holding that constructive refusal was shown where police waited ten to twenty seconds after announcement without receiving a verbal or physical response); *United States v. Gatewood*, 60 F.3d 248 (6th Cir.), *cert. denied*, 116 S. Ct. 546 (1995) (holding that

approximately ten seconds between announcement and entry was reasonable).

To summarize, the foregoing cases reveal that the determination of whether a search is reasonable under the Fourth Amendment depends in part on whether the officers' entry into a residence was preceded by a knock on the door and an announcement of the officers' presence and purpose. Of course, not every execution of a search warrant will require a knock and announcement prior to entry. The test is whether the police have a reasonable suspicion that knocking and announcing their presence would be dangerous or futile, or that it would inhibit the officers' effective investigation of the crime, such as resulting in the destruction of evidence. Mere technical compliance with the "knock and announce" requirement is not sufficient where there is not a reasonable amount of time between the announcement and forced entry, unless exigent circumstances, including danger or harm to officers or others and the destruction of evidence, were known to the officers at the time of entry.

Here, testimony of the executing officers did not demonstrate any exigent circumstances that would justify their forcing entry into Appellants' residence after having waited only two to three seconds. Detective Wayne Barnett testified that the door to the residence was closed, as were the window shades. As soon as he knocked on the door, he yelled, "Police, search warrant[.]" A couple of seconds later, another officer hit the door with the battering ram, forcing the door open. The time that elapsed between the announcement and the strike of the battering ram was a mere two or three seconds. Barnett stated that he heard no suspicious noises coming from the residence as he approached it, and that he had no reason to believe that anyone inside the residence might be attempting to escape or destroy the evidence. He stated further that he had no reason to believe that there were guns or weapons inside the residence, or that any of

the occupants had any violent or assaultive tendencies; he was aware that the only two individuals inside the residence at the time were two unarmed females. Barnett explained that, in fact, they had handled this search warrant according to standard procedure, the same way in which they handle all drug warrants.

Detective Charles Kerr supported Barnett's version of events, stating that a few seconds expired between the time the officers announced their presence and the time they forced open the door with the battering ram. Kerr also echoed Barnett's testimony that this particular search warrant was served the same way that they normally execute search warrants. Likewise, Officer Monty McMillen, the officer who actually used the battering ram, testified that the officers yelled and announced themselves as he hit the door. McMillen indicated that just a few seconds passed between the knock on the door and the time that he forced open the door with the battering ram.

We conclude that under the circumstances, the time interval between the officers' announcement and their forced entry into the residence was insufficient to demonstrate that they were constructively refused entry into the house by the occupants. There were no exigent circumstances present in this case that would have permitted the officers to make such a simultaneous forced entry. Specifically, there was no indication that the occupants posed any danger to the officers, or that they had any violent tendencies. We are not persuaded by the State's assertion that syringes inside the residence posed a danger to officers upon entry. Syringes, while capable of spreading deadly diseases, would pose little, if any, danger to the officers, who entered the residence with their guns drawn. Similarly, there was no evidence that any wait by them would have been futile, as the officers had conducted surveillance on the residence and knew that there were

two persons present inside.[2] Moreover, there was no evidence that in this particular case the occupants may have attempted to destroy the evidence, for example, by flushing it down the toilet. Evidence that Schnitzlein was caught by officers in the act of attempting to hide drugs under a pillow is irrelevant to our review. Such information cannot be considered in determining the reasonableness of the entry because it was not known to the officers at the time of their entry.

Furthermore, the fact that the confidential informant told the officers that there were drugs in the bedroom does not support the State's claim that the drugs were capable of being easily destroyed. Without the benefit of further evidence, such as the location of the bathroom in relation to the bedroom where the drugs were kept, any determination regarding destruction of the drugs in this case would be speculative at best. Testimony from Barnett and Kerr as to their *general experience* in serving drug search warrants, that suspects often attempt to destroy the evidence once they become aware the police are there, is not sufficient to demonstrate any exigent circumstances in this particular case. Were we to uphold the officers' actions in this case based solely on what generally has occurred in other drug searches, we would be effectively recognizing a presumption that in all drug searches the suspects will attempt to destroy evidence if the police announce their presence. Such a presumption is prohibited by the decision in *Richards*, 520 U.S. 385. Accordingly, we conclude that the officers' conduct violated the Fourth Amendment's protection from unreasonable searches and seizures. We must now determine the appropriate remedy for such violation.

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[2] Both Barnett and Kerr indicated that Schnitzlein's daughter was located near the front door at the time they entered. Arguably, she may have been attempting to comply with the law and permit the officers to enter.

III. Application of the Exclusionary Rule

The State urges us to adopt a remedy other than suppression of the evidence pursuant to the Fourth Amendment exclusionary rule. The State asserts that because the purpose of the exclusionary rule is to deter police misconduct, it would be inappropriate to exclude the evidence in this case because the decision to act illegally (not to knock and announce before forcing entry) was not motivated by a desire to gather evidence by any means other than a search warrant issued upon probable cause. We agree with Appellants, however, that exclusion is the only practical remedy for such police misconduct.

Although the Supreme Court has not directly addressed the issue of the appropriate remedy for violations of the "knock and announce" rule within the context of the execution of a valid search warrant, various federal circuit courts and state courts have. For instance, in *Marts*, 986 F.2d 1216, the Eighth Circuit rejected the government's good-faith defense, under *United States v. Leon*, 468 U.S. 897 (1984), and held that the only appropriate remedy in that case was exclusion of the evidence. The court explained:

> The *Leon* decision does not extend to the instant case, where there is no indication that the officers' conduct was objectively reasonable. Rather, there was a clear violation of the knock and announce rule, without the presence of exigent circumstances. The Fourth Amendment limitations are designed to deter precisely this kind of conduct. The incentive for officers to operate within those limitations in the future is provided by our application of the exclusionary rule.

Id. at 1219. Similarly, in *United States v. Bates*, 84 F.3d 790, 795 (6th Cir. 1996), the Sixth Circuit held that "unless exigent circumstances exist, the failure of state law enforcement officials

to knock and announce their presence will render the evidence procured during the ensuing execution of a warrant inadmissible." *See also Moore*, 91 F.3d 96 (affirming the district court's suppression of the evidence where police violated the "knock and announce" rule); *United States v. Becker*, 23 F.3d 1537 (9th Cir. 1994) (holding that evidence obtained during execution of a search warrant should be suppressed due to the officers' failure to knock and announce where no exigent circumstances were present); *Knapp*, 1 F.3d 1026, 1030 (holding that "[e]vidence seized must be suppressed as the fruit of an unlawful search if the officers failed to comply with the knock and announce statute") (citing *United States v. Ruminer*, 786 F.2d 381 (10th Cir. 1986)); *Polidori*, 476 N.W.2d 482, 485 (holding that "[t]here can be no dispute that evidence seized in violation of the Fourth Amendment is subject to the exclusionary rule") (citing *Mapp v. Ohio*, 367 U.S. 643 (1961)).

Furthermore, the Supreme Court has applied the exclusionary rule to suppress evidence obtained from an unlawful arrest predicated on the arresting officers' failure to comply with the "knock and announce" rule. In *Miller v. United States*, 357 U.S. 301 (1958), the Court explained that although it was mindful of society's reliance on law enforcement agencies to achieve law and order:

> [I]nsistence on observance by law officers of traditional fair procedural requirements is, from the long point of view, best calculated to contribute to that end. However much in a particular case insistence upon such rules may appear as a technicality that inures to the benefit of a guilty person, the history of the criminal law proves that tolerance of shortcut methods in law enforcement impairs its enduring effectiveness. The requirement of prior notice of authority and purpose before forcing entry into a home

> is deeply rooted in our heritage and should not be given grudging application. . . . Every householder, the good and the bad, the guilty and the innocent, is entitled to the protection designed to secure the common interest against unlawful invasion of the house.

Id. at 313 (footnote omitted).

We are persuaded by the foregoing decisions and the analysis offered by the Court in *Miller*. We thus conclude that, under the particular facts and circumstances of this case, exclusion of the evidence is the only appropriate remedy. As discussed at length above, there were no exigent circumstances present at the time the officers entered Appellants' residence that would justify their failure to knock and announce their presence before breaking in the door with a battering ram. Although there is no dispute that the search warrant here was issued upon probable cause, the executing officers nonetheless violated Appellants' Fourth Amendment rights when they forced their way into the residence without first complying with the "knock and announce" rule. The presence of an otherwise valid search warrant does not lessen the degree of the violation. In this respect, we concur with the reasoning offered by the Court in *Richards*, 520 U.S. 385, 393 n.5, that "[w]hile it is true that a no-knock entry is less intrusive than, for example, a warrantless search, the individual interests implicated by an unannounced, forcible entry should not be unduly minimized." Accordingly, we conclude that the appropriate remedy for the misconduct in this case is suppression of the evidence obtained as a result of the search.

We reject the State's argument that exclusion of the evidence is not appropriate because the evidence would have been inevitably discovered by legal means (the search warrant) despite the illegal entry. We also reject the State's argument that there was an independent source for the evidence, namely the previously

procured search warrant. These same arguments were offered by the government in *Marts*, 986 F.2d 1216, and were rejected by the Eighth Circuit.

In *Marts*, the government argued that even if the officers had waited an additional period of time (longer than five seconds), the exact same search would have been conducted and the exact same evidence would have been seized. Nonetheless, the court concluded that suppression of the evidence was mandated, stating that "[l]ongstanding constitutional principles regarding unlawful search and seizure bar the government's use of the fruits of an unlawful search simply because the officers 'would have found it anyway.'" *Id.* at 1219 (footnote omitted). The *Marts* court also rejected the theory advanced by the dissent that the evidence should be admissible under the independent-source rule. The dissenting judge relied on *Segura v. United States*, 468 U.S. 796 (1984), as does the State in this case. Although the court initially rejected application of the independent-source rule on the ground that it was not raised below, it addressed the merits of the theory:

> Under the dissent's application of the independent source rule, the knock and announce rule codified under § 3109 would be meaningless since an officer could obviate illegal entry in every instance simply by looking to the information used to obtain the warrant. Under the dissent's reasoning, officers, in executing a valid search warrant, could break in doors of private homes without sanction.

Marts, 986 F.2d at 1220. The court then distinguished the facts of *Segura*, where the police entered the apartment without a warrant in order to secure it until a warrant could be obtained with previously known information. Although the initial entry was invalid, the search itself, pursuant to the subsequently obtained warrant, was determined to be reasonable because it

was based on an independent source that provided probable cause for issuance of the warrant. The Eighth Circuit concluded:

> The significant factor in *Segura* is that the search warrant and the evidence seized under it were totally unrelated to the illegal entry. In the present case the search warrant, *although legally obtained*, was executed in violation of § 3109, and its execution was directly connected to the illegal entry.

Id. (emphasis added).

We find that reasoning sound and directly applicable to the facts of this case, where the search warrant, although based on probable cause and otherwise legally obtained, was executed in violation of the Fourth Amendment "knock and announce" rule, and its execution was directly connected to the illegal entry. We thus conclude that exclusion of the evidence is the appropriate remedy for the officers' misconduct in this case. We concur with the Eighth Circuit that were we to hold otherwise, the "knock and announce" rule would be rendered meaningless. Accordingly, we reverse the trial court's denial of Appellants' motions to suppress, and we remand the case to the trial court to vacate the Appellants' conditional pleas of *nolo contendere* pursuant to Rule 24.3(b).

98-1713

No. _____

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF ARKANSAS,
Petitioner,

v.

WALTER DON MAZEPINK,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an absent homeowner with a legitimate expectation of privacy in his premises is entitled to claim Fourth Amendment protection where police officers executing a search warrant fail to knock and announce prior to their forcible entry into his residence when the homeowner's family members and invitees are inside?

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STATEMENT OF THE CASE

On December 20, 1996, police officers of the Fort Smith Police Department, Fort Smith, Arkansas, were authorized to execute a search warrant at the residence shared by Respondent, Walter Don Mazepink, and his girlfriend, Janice Gail Schnitzlein. However, the search warrant did not authorize a "no-knock" search.

Shortly before the execution of the search warrant police officers observed the Respondent leave the residence and drive away in a vehicle. Also prior to entry, police officers observed an adult female, later identified as Janice Schnitzlein's daughter, Tricia Bencie, arrive at the residence.

Immediately prior to their forcible entry into the Respondent's residence, the police were aware, or had reasonable cause to believe, the following facts relevant to the Respondent's property and to the personal safety of police officers and persons inside the residence:

1. That the only persons inside the residence were two unarmed females;

2. That there was no reason to believe there were any guns inside the residence;

3. That there was no evidence that Janice Schnitzlein or her daughter, Tricia Bencie, had any violent or assaultive tendencies;

4. That there was no evidence that any of the three individuals, the Respondent, Janice Schnitzlein, or Tricia Bencie, had ever made

any statement that he or she would resist arrest if such were to be attempted by a police officer.

Therefore, immediately prior to their forcible entry into Respondent's residence, the police officers had no reason for concern about their personal safety so as to justify the destruction of Respondent's property or to risk the personal safety of Janice Schnitzlein or Tricia Bencie. Furthermore, the police officers had no reason to believe that the evidence was susceptible to ready destruction. Finally, the police did not have reason to believe that persons inside the residence were aware that police officers were waiting to execute a search warrant.

At approximately 6:56 p.m., four police officers quickly approached the wooden, front door of Respondent's residence while two police officers watched the back of the premises. The lead investigator in the case, Detective Wayne Barnett, knocked on the front door and shouted, 'Police! Search warrant!" Approximately two to three seconds later, another police officer broke open the front door with a battering ram. The four police officers entered the residence with their weapons drawn, shouting, "Police! Search warrant!"

Upon entry these police officers immediately encountered Ms. Bencie standing near the front door in the living room. Detective Barnett ran past Ms. Bencie to a back bedroom of the residence where he found Ms. Schnitzlein. After handcuffing Ms. Schnitzlein, Detective Barnett located approximately four ounces of methamphetamine and various items of drug paraphernalia. Shortly thereafter, the Respondent returned to the residence and was immediately

placed under arrest. During the ensuing search of the Respondent's residence approximately eight more ounces of methamphetamine were found in a portable ice chest in the garage attached to the residence. The Respondent and Ms. Schnitzlein were charged with possession of methamphetamine in excess of 400 grams and possession of drug paraphernalia.

Both the Respondent and Ms. Schnitzlein filed motions to suppress evidence. At the pre-trial hearing both defendants argued that the search of their residence was unreasonable under the Fourth Amendment because the police had forcibly entered without first knocking and announcing their authority and purpose, and under the particular circumstances of their case, the police did not have reasonable suspicion that knocking and announcing would be dangerous or futile, or that it would inhibit the effective investigation of the crime, for example, by allowing the destruction of evidence. The trial court denied the Respondent's and Schnitzlein's motions to suppress evidence.

On December 8, 1997, with the approval of the trial court and the consent of the prosecuting attorney, the Respondent and Schnitzlein entered conditional pleas of nolo contendere pursuant to Arkansas Criminal Procedure, Rule 24.3(b) to the offenses of Possession with Intent to Deliver a Schedule II Controlled Substance and Possession of Drug Paraphernalia. The Respondent was sentenced to the Arkansas Department of Corrections for 40 years with 20 years to be suspended.

On appeal to the Arkansas Supreme Court, the Respondent and Ms. Schnitzlein again argued that the evidence seized during the search of their residence should be

suppressed because the police had failed to knock and announce their identity and purpose prior to attempting forcible entry. The Respondent and Ms. Schnitzlein contended that police forcibly entered their residence pursuant to a standard police procedure for executing felony search warrants and not because police had reasonable suspicion of countervailing law enforcement interests that would justify dispensing with the knock and announce requirement.

The Petitioner addressed the arguments on the merits, and further argued that the Respondent did not have standing to allege his Fourth Amendment rights were violated by the illegal entry since he was not present at the time the police forcibly entered his residence. The Petitioner also argued that the evidence seized was admissible under the "inevitable discovery" doctrine, and that application of the exclusionary rule was not the appropriate remedy for a knock and announce violation.

The Arkansas Supreme Court applied traditional Fourth Amendment analysis in rejecting the Petitioner's argument that the Respondent lacked standing to challenge the police officers' method of entry into his residence because he was not present at the time of entry. (Pet.App. 3-8) The Court held that the Respondent's "standing" to seek exclusion of the evidence obtained during the search of his residence was grounded in his right to exclude others and to be free from illegal police invasion of his privacy in his residence. The Court followed *Alderman v. United States*, 394 U.S. 165 (1969) in ruling that the Respondent's legitimate expectation of privacy in his residence encompassed his right to expect not only privacy for himself, but for his family and invitees, including his live-in girlfriend, Ms. Schnitzlein, and her daughter, Ms. Bencie. (Pet.App.7) The Court also rejected the Petitioner's other arguments.

Accordingly, the Court reversed the trial court's denial of the Respondent's and Ms. Schnitzlein's motions to suppress the evidence and remanded the case to the trial court to vacate the conditional pleas of nolo contendere. (Pet.App.20) From that ruling the Petitioner brought its Petition for a Writ of Certiorari with regard to the Respondent's entitlement to Fourth Amendment protection.

REASONS FOR DENYING THE WRIT

I. The Arkansas Supreme Court's Decision Is Not In Conflict With Decisions of Other Federal and State Courts.

In this case the Arkansas Supreme Court applied traditional Fourth Amendment analysis in reaching its unanimous decision that the Respondent had "standing" to challenge the legality of the search of his residence, including the method of entry and execution of the search, although he was not present at the time of the illegal entry. (Pet.App.3-6) The Court relied upon principles set forth in *Rakas v. Illinois,* 439 U.S. 128 (1978) in determining that search of the Respondent's residence infringed an interest of the Respondent the Fourth Amendment was designed to protect. (Pet.App.4) The Court relied upon *Alderman v. United States,* 394 U.S. 165,179 n.11 (1969) in ruling that Respondent's legitimate expectation of privacy in his residence encompassed his right to expect privacy, not only for himself, but also for his family and invitees, including Ms. Schnitzlein and Ms. Bencie. Implicit in the Court's ruling pursuant to *Alderman* is the Respondent's Fourth Amendment interest in the personal safety of Ms. Schnitzlein and Ms. Bencie who were at risk due to their presence inside the residence at the time of the police officers' forcible entry. (Pet.App.7-8)

Since the Petitioner cannot reasonably claim any conflict of authority in the established principles set forth in *Rakas* and *Alderman* which were relied upon by the Arkansas Supreme Court in reaching its decision, the Petitioner complains that the Court misapplied the law articulated by this Court concerning who may challenge a search. Brief of Petitioner at 6.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law. Sup. Ct. R. 10(c).

There is no compelling reason for this Court to grant certiorari to consider the Petitioner's claim that in this case the Arkansas Supreme Court misapplied the properly stated rules of law set forth in *Rakas* and *Alderman*.

Petitioner claims that the Arkansas Supreme Court decision has created a conflict of authority with regard to whether an absent defendant may challenge police officers' method of entry in a premises where the defendant has a legitimate expectation of privacy. Brief of Petitioner at 6. The Petitioner cites a number of older federal and state cases that deal with interpretation of the "knock and notice" provisions of federal statute 18 U.S.C. § 3109 and similar state statutes. Brief of Petitioner at 6-8. Evaluation of the cases cited, however, presents no real conflict of authority as to the question presented in the Petition. A review of these cases shows that there is no compelling reason for this Court to grant certiorari to consider fact-based distinctions between Respondent's case and the cases described below.

For example in *United States v. Valencia-Roldan*, 893 F.2d 1080 (9th Cir. 1990), a case relied upon by the

Petitioner, the Ninth Circuit Court of Appeals did not even consider whether the executing officers failed to comply with the "knock and notice" provisions of 18 U.S.C. § 3109 before entering the defendant's apartment. The Court simply stated in a conclusionary manner that defendant lacked standing to assert this argument because he was not present at the time. *Id.* at p. 1081, n.1. Without a proper legal analysis such as that set forth below in *United States v. Zermeno,* 66 F.3d 1058 (9th Cir. 1995) it is impossible to determine whether the unannounced entry infringed upon an interest of the absent defendant that the Fourth Amendment was designed to protect. Without such a determination *Valencia-Roldan* cannot properly be relied upon as authority in support of the Petitioner's position.

In *United States v. Zermeno,* 66 F.3d 1058, 1062 (9th Cir. 1995) the same court sets forth the three interests that are said to be served by the rule of announcement:

> (1) it reduces the potential for violence to both the police officers and the occupants of the house into which entry is sought; (2) it guards against the needless destruction of private property; and (3) it symbolizes the respect for individual privacy summarized in the adage that "a man's house is his castle."

The court went on to hold that "neither Zermeno nor Silva Sosa had any expectation of privacy in the house the agents forcefully entered." Thus, neither defendant was entitled to standing under 18 U.S.C. § 3109 based upon a privacy interest.

The Respondent, on the other hand, is entitled to claim Fourth Amendment protection based upon his legitimate

expectation of privacy in his residence, a fact which has never been disputed by the Petitioner. *See* Brief of Petitioner at 6,10. In its opinion the Arkansas Supreme Court cited *Alderman v. United States,* 394 U.S. 165, 179 n.11 (1969) in ruling that the Respondent's "legitimate expectation of privacy in his residence encompasses the right to expect not only privacy for himself, but also for his family and invitees, including his live-in girlfriend, Appellant Schnitzlein and her daughter." (Pet.App.7) It should be noted that the Respondent's property and privacy interests are personal to him and not vicariously asserted through Ms. Schnitzlein or her daughter. *See Rakas v. Illinois,* 439 U.S. 128,133 (1978). Therefore, unlike the defendants in *Zermeno,* the Respondent is entitled to Fourth Amendment protection, not only as to himself, but also as to his family and invitees, including Ms. Schnitzlein and Ms. Bencie.

In *Zermeno* neither defendant was entitled to standing based upon a property interest because neither defendant showed that he had a property interest in the house the agents forcefully entered. The Respondent, on the other hand, is entitled to Fourth Amendment protection based upon his property interest in his residence. The Respondent's property interest was infringed when the police broke open his front door with a battering ram.

The Petitioner sets forth that the defendant in *Zermeno* could not challenge officers' failure to knock and announce because he was not present at the time of the officers' entry. On its face this appears to support the Petitioner's argument. Upon closer review, however, it clearly does not. The *Zermeno* court ruled that neither defendant came within 18 U.S.C. § 3109's safety rationale because they were not present at the time of the search. *Zermeno* at 1062. Unlike the defendants in *Zermeno,* however, the Respondent had a

safety interest. The Respondent's safety interest was not in himself, but in his family and invitees, who were inside the residence at the time of the forcible police entry. There was an obvious risk to the personal safety of both Ms. Schnitzlein and Ms. Bencie when the police broke open the Respondent's front door and rushed inside his residence with their weapons drawn. Under the principles set forth in *Alderman* the Respondent is entitled to claim Fourth Amendment protection as to the personal safety and security of both Ms. Schnitzlein and Ms. Bencie.

Therefore, unlike the defendants in *Zermeno* the Respondent is entitled to claim Fourth Amendment protection based upon a privacy, property, and a safety interest.

The Petitioner cites *United States v. DeLutis*, 722 F.2d 902 (1983), which is distinguishable from Respondent's case in a number of respects. First, the *DeLutis* court noted that there was a "serious doubt" that the defendant had standing to raise the knock and announce issue on appeal since he had not joined in the motion to suppress filed by his wife. *Id.* at 908. The Respondent, on the other hand, did raise the knock and announce issue in his motion to suppress the evidence.

Furthermore, the defendant was not residing in the house at the time of the entry by the officers, but was serving time in prison for an unrelated offense. *DeLutis*, 722 F.2d at 908. Here, the Respondent was residing in the house and was observed by police officers leaving the residence just moments before the police officers broke open his front door. The court described the defendant as an absentee owner who "hardly comes within the purposes of the statute." *Id.* Arguably, under the facts of the case, the defendant had abandoned the residence, albeit involuntarily, and therefore could not come within the protection of 18 U.S.C. § 3109.

The Petitioner cites two state cases, *State v. Papineau*, 146 Ariz. 272,705 P.2d 949 (Ariz.Ct. App. 1985), and *State v. Johnson*, 716 P.2d 1006 (Alaska Ct.App. 1986) in support of its position that the Respondent, not present at the time of the police entry, does not have standing to challenge a knock and announce violation. Brief of Petitioner at 7-8.

The facts of the two cases cited by the Petitioner, however, are fundamentally different than the circumstances involved in the Respondent's case. In each of these cases the police entered the residence through an unlocked door. Neither *Papineau* nor *Johnson* involve forcible entry, destruction of property, nor any material risk to the safety of persons inside the residence such as occurred at the Respondent's residence.

Consequently, the holdings in *Papineau* and *Johnson* are not persuasive as to the issue in the Respondent's case. Here, the destruction of the Respondent's property could have been avoided if Ms. Schnitzlein and Ms. Bencie, the two women inside the Respondent's residence at the time of the forcible police entry, simply had been given the opportunity to open the door. Further, the manner of police entry in the Respondent's case, breaking open the front door with a battering ram, and rushing inside with weapons drawn, involved an increased risk to the safety of the Ms. Schnitzlein and Ms. Bencie. Indeed, Ms. Bencie was in the living room and near the front door when the police broke the door open with a battering ram and rushed inside. (Pet.App.15, n.2) This risk to the personal safety of Respondent's family members and invitees could have been avoided if the occupants simply had been given the opportunity to open the door to comply with the lawful authority of the police.

Righter v. State, 704 A.2d 262 (Del.1997), *cert. denied*, 118 S.Ct. 1814 (1998), is also distinguishable from the Respondent's case in that the court held that Righter was not the owner of the property and did not have a privacy interest nor a property interest in his grandmother's house.[1] Again, unlike the defendant in *Righter*, the Respondent lived in the residence and had a legitimate expectation of privacy in his home. This included his interest in avoiding the destruction of his property and his interest in the privacy and the safety of his family and invitees.

The Petitioner claims that this Court should consider the issue of whether a person without a legitimate expectation of privacy in the premises, but who is present when officers enter, can challenge officers' failure to knock and announce. Petitioner's Brief at 8-9. As previously stated the Petitioner has never disputed that the Respondent has a legitimate expectation of privacy in his premises. Petitioner's Brief at 6 and 10. There is no compelling reason for this Court to grant certiorari to consider an issue which is not even presented in the facts of Respondent's case.

II. The Arkansas Supreme Court Properly Stated the Rule of Law That a Homeowner Not Present At the Time of Police Officers' Forced Entry into His Residence Can Challenge the Officers' Failure to Knock and Announce.

The gravamen of the Petitioner's argument is that a homeowner cannot challenge police failure to knock and announce prior to forcible entry into his residence unless he

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[1] Righter could only claim a property interest as an occupant of a bedroom in his mother's home.

is physically present at the time of the illegal entry. The Petitioner reaches this erroneous conclusion because it begins with a flawed premise. The Petitioner notes the purposes of the knock-and-announce rule as set forth in *Richards v. Wisconsin,* 520 U.S. 385 (1997). These purposes are to inform occupants of a dwelling that it is about to be invaded, to give them an opportunity to comply with the law, and avoid damage to property by allowing the occupants to open the door so that the police can enter peaceably. *Id.* at 393 n.5. These stated purposes provide the premise by which the Petitioner reaches its erroneous conclusion that, "By definition, the failure to knock and announce cannot infringe these interests of a person who is not present at the time of the entry." Brief of Petitioner at 11.

The error in the Petitioner's analysis is that the above-described purposes of the knock and announce rule, while correctly stated, do not completely set forth the all the interests that are served by the rule of knock and announcement.

> Three interests are said to be served by the rule of announcement: (1) it reduces the potential for violence to both the police officers and the occupants of the house into which entry is sought; (2) it guards against the needless destruction of private property; and (3) it symbolizes the respect for individual privacy summarized in the adage that "a man's house is his castle." *United States. v. Zermeno* 66 F.3rd 1058 (1995) citing *United States v. Lockett,* 919 F.2d 585 (9th Cir. 1990).

When the interests served by the rule of knock and announcement are fully stated, it is obvious that the

Petitioner's argument fails to consider properly Respondent's interests in: (a) Avoiding the destruction of his property; and, (b) The privacy and safety of his family and invitees inside his residence at the time of the unannounced, forcible police entry.

The common law recognized that individuals should have an opportunity to comply with the law and to avoid the destruction of property occasioned by forcible entry. *Richards v. Wisconsin* 520 U.S. 385, 393 n.5 (1997) citing *Wilson v. Arkansas* 514 U.S. 927,930-32 (1995). Additionally, when police enter a residence without announcing their presence, the residents are not given any opportunity to prepare themselves for such an entry. *See Richards* at 393n.5.

As the Arkansas Supreme Court correctly noted there were two persons inside the Respondent's residence at the time the officers prepared to enter and the officers were aware of this. Thus, at least one person was present to comply with the officers' request for entry so that they could execute their search warrant. (Pet.App.7) Further, Ms. Schnitzlein's daughter was located near the front door at the time they entered, and "Arguably, she may have been attempting to comply with the law and permit the officers to enter." (Pet.App.15,n.2)

The Petitioner concedes that the Respondent could challenge the search itself. Petitioner's Brief at 10. The Petitioner claims, however, that the Arkansas Supreme Court erred "by concluding that because Mazepink could challenge the search generally, his rights necessarily were infringed by any defect in the method of entering to execute the search warrant." *Id.*

The Petitioner's argument fails to properly consider that it is the method of entry, i.e., forced entry by breaking open doors, that is so destructive to private property interests, so invasive to privacy interests, and so dangerous to the personal safety interests of both the occupants and to the police. Further, it is the method of entering, by breaking open the door of a dwelling, that, historically, was not allowed without announcement of identity and purpose prior to entry. *Wilson* 514 U.S. 927, 931-36.

Here, the Arkansas Supreme Court, applying traditional Fourth Amendment analysis, properly stated the rule of law that because Respondent Mazepink had a reasonable expectation of privacy in the area searched, he was entitled to claim Fourth Amendment protection as to the method of execution of the search. (Pet.App.6)

The Petitioner argues further that the Arkansas Supreme Court failed to properly consider whether the method of entry "infringed any interest of Mazepink's that the Fourth Amendment was designed to protect." Brief of Petitioner at 9-10. Yet, the Respondent's interests were fully and properly considered by the Arkansas Supreme Court under the principles set forth in *Rakas v. Illinois,* 439 U.S. 128 (1978) at (Pet.App.4-6), and *Alderman v. United States,* 394 U.S. 165, 179 n.11 (1969) at (Pet.App.7-8).

The Petitioner attempts to argue that the Arkansas Supreme Court's holding is illogical when the Court states at (Pet.App.7) that its analysis of the issue might have been different if there had been no occupants inside the residence at the time the police forced their entry into the home. Petitioner's Brief at p.11. However, the Court's ruling is not only logical, it is completely consistent with the precedents set

forth in *Wilson* and *Richards*. These cases recognized that "unless police have reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence," (*Richards* at 394), that "individuals should have an opportunity to comply with the law and to avoid the destruction of property occasioned by a forcible entry."(*Richards* at 393 n.5, citing *Wilson* at 930-932). Therefore, if the police were to encounter a situation wherein they were aware immediately prior to entry that there was no one inside the residence, compliance with the knock and announce requirement would be excused as being "futile." *Richards* at 394. This was not the situation in Respondent's case, however, since immediately prior to their forcible entry the police were aware that Ms. Schnitzlein and Ms. Bencie were present and could have opened the Respondent's door to the police if they been given the opportunity to do so.

III. Other Reasons for Denying the Writ.

A. Adoption of the Petitioner's Requirement That a Person Be"Present" at the Time of the Illegal Entry Would Appear to Require That *Alderman v. United States* Be Overruled

The Arkansas Supreme Court relied upon the principles set forth in *Alderman v. United States* 394 U.S. 165, 179 n.11 (1969) in ruling that "Mazepink's legitimate expectation of privacy in his residence encompasses the right to expect not only privacy for himself, but for his family and invitees, including his live-in girlfriend, Appellant Schnitzlein, and her daughter." (Pet.App.7)

If this Court were to adopt the Petitioner's proposed requirement that a homeowner be physically "present" at the time of the illegal police entry, it would appear to be necessary to overrule the long-standing legal precedent set forth in *Alderman v. United States. Id.*

B. Petitioner's Requirement That the Respondent Must Be "Present" On the Premises Is Logically Inconsistent.

The Petitioner offers no explanation for the logical inconsistency inherent in the Petitioner's argument. The inconsistency is that the Respondent would be entitled to Fourth Amendment protection from police destruction of his property if he were "present" on the premises, but he would be denied Fourth Amendment protection if he were to be absent from the premises, even momentarily, at the time of the illegal entry. Again, the inconsistency is due to the Petitioner's disregard of the principles set forth in *Alderman* and *Richards*. Under the principles established in these cases the Respondent's Fourth Amendment interest in avoiding the destruction of his property is protected by his family and invitees inside the residence being allowed the opportunity to open the Respondent's door to the lawful authority of police..

C. The Petitioner's Requirement That Respondent Be "Present" to Claim Fourth Amendment Protection Ignores the Respondent's Legitimate Interest in the Personal Safety and Security of His Family Members and Invitees.

Finally, the Petitioner's argument that the Respondent must be physically "present" in order to challenge the police officers' failure to knock and announce prior to entry fails to

consider the Respondent's legitimate interest in the personal safety and security of his family and invitees who could be injured in an unannounced, forcible police entry. Under *Alderman v. United States* 394 U.S. 165 (1969) the Respondent has a legitimate interest in the personal safety and security of his family and invitees for which he is entitled to Fourth Amendment protection. In *Alderman* this court ruled that "officialdom invades an area in which the homeowner has the right to expect privacy for himself, his family, and his invitees, and the right to object to the use against him of the fruits of that invasion, not because the rights of others have been violated, but because his own were." *Alderman* at 179 n.11. Under the Petitioner's view, the Respondent would only be entitled to claim Fourth Amendment protection as to his own personal safety, but not as to the personal safety of his family and invitees who were inside the residence at the time of the police forcible entry. The Petitioner's position that Respondent does not have a legitimate interest in the personal safety and security of his family and invitees is not only legally improper under the principles set forth in *Alderman*, but is also in disregard of the practical realities and values inherent in everyday family and extended family living situations.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

/s/_____
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